Comptroller General
of the United States

Washington, D.C. 20548

630146

Decision

Matter of: L & R Rail Service

File: B-256341

Date: June 10, 1994

David M. Rusconi for the protester.
Lewis E. Foster for General Railway Services, Inc., and Eugene J. Sullivan, Jr., for Rail Management Services, interested parties.
Lee Wolanin, Esq., Department of Transportation, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bidder's failure to acknowledge a solicitation amendment that had no material impact on certain requirements did not render its low bid for those requirements nonresponsive and, therefore, rejection of the bid was improper.

DECISION

L & R Rail Service protests the rejection of its bid under invitation for bids (IFB) No. DTRS-57-93-B-00030, issued by the Volpe National Transportation Systems Center, Department of Transportation, for used, reconditioned tank cars and railway box cars. L & R's bid was rejected because L & R did not acknowledge receipt of amendment 0002. L & R maintains that its bid was improperly rejected since the amendment had no effect on the bid that it submitted. L & R also protests the failure of the agency to provide it with a copy of the amendment prior to bid opening.

We deny the protest in part and sustain it in part.

The IFB, issued on August 13, 1993, requested prices on 300 used, reconditioned tank cars with 20,000-gallon capacities and 300 used, reconditioned railway box cars with 100-ton capacities. Bidders were also to include destination charges for various designated destinations. Awards were to be made based on the lowest price (unit price plus destination charge) per type of car by destination up

to the required quantity of 300 tank cars and 300 box cars. The IFB provided that the government could make multiple awards.

Amendment 0001 was issued on August 25 to change the box car capacities from 100 to 70 tons. On September 13, amendment 0002 was issued. This amendment changed the bid opening date from September 21 to September 29 and provided various clarifications to the specifications based on questions posed by various bidders.[1]

Bids were opened on September 29. L & R submitted a unit price of $26,300 for the 300 tank cars and a unit price of $32,750 for the box cars. Since L & R had not acknowledged receipt of amendment 0002 in its bid, the agency subsequently rejected L & R's bid as nonresponsive. Awards were made to General Railway Services, Inc. (which bid on 171 tank cars and 76 box cars at unit prices of $33,500 and $32,900, respectively) for 26 tank cars and for 76 box cars and to Rail Management Services (which bid only on 7 varying amounts of box cars at unit prices ranging from $28,200 to $37,000) for 72 box cars. Destination charges bid by each bidder varied.

The agency contends that L & R's bid was properly rejected as nonresponsive because L & R failed to acknowledge amendment 0002, and without an acknowledgment, L & R could not be held to supply cars that met the specifications as clarified by that amendment. The agency maintains that L & R's bid for the tank cars was nonresponsive because the amendment changed the requirement for cleaning the exterior of the tank cars from a requirement for sandblasting to also include grit blasting. Further, the agency states that both amendments were sent to all firms, including L & R, which were sent the IFB.

L & R argues that it should not be penalized because the agency failed to provide it with a copy of amendment 0002 and that, in any event, the amendment did not make any substantive change to the specifications, and thus the cars it would have furnished had it received the award would have met all of the agency's requirements.[2]

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[1]Apparently, L & R called the contracting agency on September 13 to request a copy of amendment 0001 and was advised that bid opening was extended, but was not advised of the existence of amendment 0002.

[2]The agency initially argues that L & R's protest is untimely because the contracting officer advised L & R the day after bid opening during a phone call that its bid was

(continued...)

The Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. In pursuit of these goals, a contracting agency must use reasonable methods to disseminate solicitation materials--including amendments--to prospective competitors. Cascade Gen., Inc., B-244395, Oct. 17, 1991, 91-2 CPD ¶ 343.

This, however, does not make the contracting agency a guarantor that these documents will be received in every instance by prospective competitors. These parties normally bear the risk of not receiving a solicitation amendment, for example, unless there is evidence (other than nonreceipt by the protester) establishing that the agency failed to comply with the requirements for giving notice of the procurement and for the distribution of amendments. Power Eng'g Contractors, Inc., B-241341, Feb. 6, 1991, 91-1 CPD ¶ 123. Here, the record shows, and L & R has presented no evidence to the contrary, that the agency mailed the amendments to all the parties that had been provided a copy of the IFB and that, except for L & R, these were received by all the parties submitting bid prices. We therefore have no basis to conclude that the proper procedures for disseminating the amendments were not followed.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive since absent such an acknowledgment, the government's acceptance of the bid would

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[2](...continued)
nonresponsive because L & R had failed to acknowledge amendment 0002. The protester denies that it was ever told it was found nonresponsive during this and other conversations prior to award. L & R states that it was told repeatedly it might be found nonresponsive, and that it never was told that the agency had made a decision to reject L & R's bid until after award. Since there is a question as to what was actually said by the agency during these conversations, we cannot conclude that L & R's protest filed after it received notice of the award is untimely. We note that the only written correspondence supports the protester's position. In a November 7 letter to the contracting officer, L & R states that it has "been made aware, by your Office, that our bid may be considered 'non-responsive.'" This letter, although not identified as a protest, states L & R's concern that its bid should not be rejected because the amendment contains no substantive changes to the specifications.

not legally obligate the bidder to meet the government's needs as identified in the amendment. Safe-T-Play, Inc., B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, Weatherwax Elec., Inc., B-249609, Oct. 26, 1992, 92-2 CPD ¶ 281, or if it would have more than a negligible impact on price, quantity, quality, or delivery, or the relative standing of the bidders. Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373. On the other hand, where an amendment has the effect of decreasing the cost of performance such that the low bidder's failure to acknowledge the amendment would have had no impact on the relative standing of bidders, and the bidder otherwise would be bound to meeting the government's requirements, the failure to acknowledge the amendment does not render the bid nonresponsive. De Ralco, Inc., supra.

Amendment 0002 contained the following questions and answers at issue here:

"BOX CARS (See Attachment J-3)

"1. Question: Are "plug" doors on boxcars acceptable?

"Answer: No only sliding doors are acceptable.

. . . . .

"5. Question: Are 'weather-proof' sliding doors acceptable?

"Answer: The requirement is for AAR Standards for water tight sliding doors.

. . . . .

"TANK CARS (See Attachment J-1)

"9. Question: Should tank cars with heating coils have the coils removed?

"Answer: Coils must be removed.

"10. Question: On interior preparation do you require a [white] metal blast?

"Answer: Yes the requirement is for a white-metal blast.

"11. Question: Can cars be blasted with metallic grit?

"Answer: The interior must be sand blasted. The exterior may be blasted with metallic grit[.]"

We agree with the agency that L & R's bid for the box cars was nonresponsive because the amendment was material and imposed a legal obligation not contained in the original IFB. The original IFB specifications in the J-3 attachment called for centered side doors, but did not state whether plug or sliding doors were required. The amendment required the side doors of the cars to be sliding doors rather than plug doors. The agency explains that it requires sliding doors because the loading areas do not provide sufficient space for plug doors which require a wide swing area. Further, as the agency points out, while the original IFB included a requirement that the boxcars be watertight with the doors closed, it did not contain any standard for watertightness. The amendment imposed the Association of American Railroad standards. The agency states that meeting these standards could increase a bidder's costs. Without acknowledging the amendment, L & R was not bound to provide sliding doors or meet the watertightness standards as required by the amendment.

As for the tank cars, however, the agency has provided no basis for us to conclude that the amendment was material. The original IFB required removal of the heating coils and a white metal blast for cleaning the interior. The amendment merely restated these requirements, and the agency does not argue otherwise. Rather, the agency relies solely on the answer to question 11 that permitted the exterior to be cleaned by blasting it with metallic grit. The IFB originally required sandblasting.

While this does represent a change rather than a restatement of a requirement, it does not provide a basis for rejecting the protester's bid. The agency admits that metallic grit blasting is a less costly method of cleaning, explaining that sandblasting requires the contractor to have a facility that meets stringent Environmental Protection Agency requirements, while grit blasting generally has less stringent rules and allows for reuse of the grit which makes it a less expensive alternative to sandblasting. Thus, the amendment simply permitted the contractor to use an alternate, lower-cost approach to performing the contract; it imposed no additional obligation. Therefore, with

respect to the tank car questions and answers in amendment 0002, we must conclude that L & R's failure to acknowledge the amendment was a minor, waivable informality and that the bid was not nonresponsive. See Pro Alarm Co., Inc., 69 Comp. Gen. 727 (1990), 90-2 CPD ¶ 242, and DeRalco, supra.

Since L & R's unit and destination prices resulted in a low price of $28,800 for the tank cars ($26,300 plus $2,500)--General Railway's total price was $34,815 ($33,500 plus $1,315)--L & R should have received award for this item. However, since the protest was not filed within 10 calendar days of award, performance was not suspended, see 4 C.F.R. § 21.4 (1994), and work has progressed to such a point that we cannot recommend that the contract for the tank cars be terminated and award instead be made to L & R. Consequently, we recommend that the protester be awarded its bid preparation costs and its cost of filing and pursuing the protest, including reasonable attorneys' fees, in connection with the award of the tank cars. 4 C.F.R. § 21.6(d)(1).

The protest is denied in part and sustained in part.

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